No. (1)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

Organizacion JD Ltda., and Manufacturas JD Ltda.,

Petitioners,

v.

United States of America, Drug Enforcement Administration, Banco Atlantico, and The Bank of New York,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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159 pp

QUESTIONS PRESENTED

1. Whether the newly enacted requirements under 18 U.S.C. § 2518(7), for "exigent circumstances" to exist, were met by the United States and the Drug Enforcement Administration, thus the disclosing and acquiring of the contents of Organizacion JD Ltda., and Manufacturas JD Ltda., in transit electronic communication is not actionable?

2. Whether the United States, and the Drug Enforcement Administration's use of only verbal orders to procure the programming of "stop ques" into the communication modems of Banco Atlantico and the Bank of New York, to acquire the contents of every third party electronic communications going to the Republic of Colombia between January 1, 1990 through August 26, 1990, including those of

Organizacion JD Ltda. and Manufacturas JD Ltda, was a violation of 18 U.S.C. § 2511(1)(a)?

3. Whether Banco Atlantico and the Bank of New York's programming of "stop ques" in their communication monitoring controls, when no warrant was issued under the Federal Rules of Criminal Procedures, violated 18 U.S.C. §§ 2511(1)(c), 2511(2)(a)(i) and 2511(3)-(a)?

4. Whether Banco Atlantico and the Bank of New York satisfied the "good faith" requirements of 18 U.S.C. § 2707, when without a warrant issued under the Federal Rules of Criminal Procedure they divulged the contents of the electronic communications of Organizacion JD Ltda., and Manufacturas JD Ltda., that were in

electronic storage for less than 180 days?

5. Whether Organizacion JD Ltda. and Manufacturas JD Ltda., as the senders and the intended recipients of three international electronic fund transfer communications, have a cause of action for direct damages against Banco Atlantico and The New York Bank, due to breach of contract?

LIST OF PARTIES

The parties that have appeared in these two cases included those listed on the case caption.

Neither Organizacion JD Ltda., nor Manufacturas JD Ltda., have either parent companies or subsidiary companies.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

The United States Court of Appeals for the Second Circuit has again decided important questions under the Electronic Communications Privacy Act of 1986, 18 U.S.C. §§ 2510 et seq., which govern the acquisition and disclosure to the United

States of in transit electronic communication; and §§ 2701 et seq., which govern the access and divulging to the United States of electronic communication in electronic storage.

The questions surrounding the interpretation of this federal law has not been, but should be settled by the Supreme Court because of the importance which Congress gave to the privacy of electronic communications.

Thus Organizacion JD Ltda., and Manufacturas JD Ltda., pray that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered on February 24, 1994.

CITATIONS TO OPINIONS BELOW

The unreported opinion of the District Court for the Eastern District of New York is reproduced at App. 1a.[1]

The February 24, 1994, opinion of the Court of Appeals, not yet reported is reproduced at App. 1b.

The opinion of the United States District Court for the Eastern District in Manufacturas Internacional, Ltda. v. Manufacturers Hanover Trust Co., and Consolidated Cases, 792 F. Supp. 180 (February 27, 1992), appeal pending, 2nd Cir. Docket No. 92-7360, is reproduced at App. 1c.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered

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[1] "App. " references are to the section and page number in the attached Appendix.

on February 24, 1994. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATUTES INVOLVED

The statutory provisions involved are 18 U.S.C. §§ 2510; § 2511(1)(a) and (c); § 2511(2)(a)(i); § 2511(3)(a); § 2516(3); § 2518(7); § 2520; § 2702(a); § 2703(a); and § 2707. These provisions are reproduced at App. 1d.

STATEMENT OF THE CASE

A. JURISDICTION BELOW

Organizacion JD Ltda., and Manufacturas JD Ltda. (hereinafter "Limited Partnerships"), filed claims for damages on August 5, 1992, based upon the provisions of 18 U.S.C. §§ 2520, and 2707; and under breach of contract.

Appellate jurisdiction is invoked pursuant to 28 U.S.C. § 1291.

B. RELEVANT FACTS

Banco Atlantico and the Bank of New York (hereinafter the "Intermediary Banks"), provide a service to the public for which they receive a portion of every payment made to the FEDWIRE, SWIFT, and CHIPS, world-wide electronic communication fund transfer systems.

On or about July 18, 1990, two Assistant United States Attorneys from the Civil Division of the Office of the United States Attorney for the Eastern District of New York, Mr. Arthur P. Hui and Mr. Gary R. Brown, (hereinafter "Messrs. Hui and Brown"), verbally instructed by telephone the Intermediary Banks to program in their respective computer communication modem devices "stop ques," so to acquire and disclose to the United States the contents of

every third party electronic funds transfer communications in transit going to any third party beneficiary in the Republic of Colombia (App. 13c).

Although the programming of "stop ques" is restricted to the Intermediary Banks communication monitoring system, the Intermediary Banks complied with the verbal instructions, and then transmitted by fax to Messrs. Hui and Brown a copy of the contents of the electronic communication acquired, and placed the information in electronic storage pending instructions.

As explained by a representative of Banco Atlantico during his deposition:

> . . . <u>We got instructions to fax them over every transaction that we got for third-party beneficiaries in Colombia</u> . . . . What we would do is fax a copy of the transaction to Mr. Hui and then he would, same day of the next day the latest, tell us over the phone, "Okey, you

> are supposed to freeze this transaction as well." And then usually the same day of the day after we would get the [warrant for arrest of article-in-rem]. (emphasis added)

On July 24 and 26, 1990, only because of the use of the "stop ques," the Intermediary Banks acquired the contents of three electronic fund transfers communications purchased in the Republic of Venezuela by the Limited Partnerships. These electronic communications were in transit to the Limited Partnerships' beneficiary bank in the Republic of Colombia. The contents of the electronic communication were immediately disclosed to Messrs. Hui and Brown, to await instructions whether to permit the transmission to proceed.

For sixteen days the Intermediary Banks maintained the information in electronic storage pending instruction.

On August 2, 1990, the Intermediary Banks refused all requests for information regarding the electronic communications of the Limited Partnerships.

Not until August 8, 1990, was the Intermediary Banks served a Seventh Amended In Rem Complaint in United States v. All Funds on Deposit in any Account Maintained at Merrill, Lynch, Pierce, Fenner & Smith, 801 F. Supp 984 (E.D.N.Y. 1992) (Weinstein, J.)(hereinafter "All Funds Case"). In addition, on the same date a Drug Enforcement Administration (hereinafter "DEA") subpoena was served. Both documents named the Limited Partnerships.

The DEA administrative subpoena sought all information from January 1, 1990, maintained in electronic storage at the Intermediary Banks of any elec-

tronic communications belonging to the Limited Partnerships.

The DEA administrative subpoena ordered, "DO NOT DISCLOSE THE EXISTENCE OF THIS REQUEST."

Because the United States and the Drug Enforcement Administration neither sought nor obtained a warrant issued under the Federal Rules of Criminal Procedure within 48 hours of their obtaining access to the contents of the Limited Partnerships electronic communication on July 24, and 26, 1990, the Limited Partnership filed a counterclaim against them when a verified claim was filed.

On February 27, 1994, three days prior to the trial in the All Funds Case, in an associated civil action, Judge Jack B. Weinstein, used the "re-

lation back doctrine," to dismiss Manufacturas Internacional, Ltda., v. Manufacturers Hanover Trust Co., and Consolidated Cases, 792 F.Supp. 180 (E.D.N.Y.), appeal pending, No. 92-7360 (2d Cir. 1992) (hereinafter the "Consolidated Bank Case")(App. 6b and 48c).

On May 8, 1992, after a two-month jury trial in the All Funds Case, the Limited Partnerships' funds were found to be not subject to forfeiture. But Judge Weinstein used the "relation back doctrine" to deny the Limited Partnerships claim for damages under 18 U.S.C. § 2520. Judge Weinstein did not consider the claim for damages under 18 U.S.C. § 2707.

On August 5, 1992, the Limited Partnerships filed the instant action seeking damages under the United States

Constitution, 18 U.S.C. §§ 2520 and 2707, as well as under contract theory.

On December 2, 1992, Judge Weinstein again granted summary judgement based on his previous use of the "relation back doctrine" in both the Consolidated Bank Case and the All Funds Case (App. 6b).

On September 10, 1993, the All Funds Case, was affirmed. See United States v. Daccarett, 6 F.3rd 37 (2nd Cir. 1993), petition for cert. filed, 62 U.S.L.W. 3454 (U.S. Nov. 15, 1993)(No. 93-1020), petition for cert. denied (U.S. March 21, 1994).

In the instant appeal, on February 24, 1994, the Second Circuit vacated and remanded to the lower court the allegation of liability against the United States and the Drug Enforcement Admin-

istration under 18 U.S.C. § 2703 (App. 13b).

However, the Second Circuit affirmed the lower court's decision that there was no civil liability either under the Fourth and Fifth Amendment, based on the lower court's finding of the existence of "exigent circumstances" (App. 8b).

Also the Second Circuit affirmed the lower court's decision that no civil liability existed under 18 U.S.C. § 2520, because the seizures did not constitute `interception' since no "device" was used by the United States (App. 11b).

Furthermore, the Second Circuit affirmed that the Intermediary Banks were not civilly liable under 18 U.S.C § 2707 for a violation of 18 U.S.C. § 2701

because their good faith reliance on an in rem court warrant or order is a complete defense under 18 U.S.C. § 2707-(d)(1) (App. 12b).

Neither the Second Circuit nor the lower court considered the requirements of 18 U.S.C. § 2518(7), or the prohibition in § 2511(1)(a), and § 2702(a).

Finally, the Second Circuit held that no action for breach of contract would lie due to the in rem judicial action (App. 19b).

REASONS FOR GRANTING THE WRIT

I

WITHIN 48 HOURS OF ACQUIRING THE CONTENTS OF THE LIMITED PARTNERSHIPS ELECTRONIC COMMUNICATION, THE UNITED STATES AND THE DRUG ENFORCEMENT FAILED TO COMPLY WITH THE REQUIREMENTS OF 18 U.S.C. §§ 2518(7) AND 2516(3), THUS CIVIL LIABILITY EXISTS DESPITE THE SECOND CIRCUIT FINDING "EXIGENT CIRCUMSTANCES."

In enacting 18 U.S.C. § 2518(7), Congress mandated a new statutory search standard involving electronic communications when alleged "exigent circumstances" exist. This standard is higher than the judicially created standard based on the Fourth and Fifth Amendment. See. United States v. James Daniel Good Real Property, 114 S.Ct. 492 (1993).

Thus when alleged "exigent circumstances" exist involving the obtaining of access to information in electronic

communication, it is the newly enacted standard under 18 U.S.C. § 2518(7), which must be complied with, not the general lesser standard under the Fourth or Fifth Amendments. See §19.5, at p. 373, The Law of Electronic Commerce, Benjamin Wright, Little, Brown and Co. (1991).

The Congressional mandate under 18 U.S.C. § 2518(7), was not even considered by either the Second Circuit or the lower court.

Their only rational for finding "exigent circumstances" was the very nature of electronic communication, that is because the electronic communications at issue were fungible and capable of rapid motion due to modern technology (App. 10b).

This rational lacks merit, and must be reversed.

Under 18 U.S.C. § 2518(7), Congress did provide for the acquiring by the United States of access to in transit electronic communication, without a warrant issued under the Federal Rules of Criminal Procedures, when alleged "exigent circumstances" exist, but only if the following requirements are met:

first, a determination has been made by an "investigative or law enforcement officer, <u>especially designated by the Attorney General, the Deputy Attorney General, the Associate Attorney General</u>";

second, that the authorized determination demonstrates that, "an emergency situation exists that involves:

(i) immediate danger of death or serious physical injury to any person,

(ii) conspiratorial activities threatening the national security interests, or

(iii) conspiratorial activities characteristic of organized crime;"

third, that "there are grounds upon which an order could be entered under [the Federal Rules of Criminal Procedure] to authorize such interception;" and,

fourth, "if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur."

The section further states that, "[i]n the absence of an order, such interception shall immediately terminate

when the communication sought is obtained or when the application for approval is denied, whichever is earlier."

Finally, the section states that, "[i]n the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any . . . electronic communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application."

A cursory review of facts establishes that all the above requirements of 18 U.S.C. § 2518(7), were violated:

First, the Department of Justice confirmed to Congress that the level of

authority required to seek a court order to permit access to electronic communication in transit would be at least Deputy Assistant Attorney General of Criminal Division or higher. See Senate Report No, 99-541 October 17, 1986, at p. 3682 ; House Report No. 647, 99th Congress, 2nd Session (1986) at p. 51. Thus Messrs. Hui and Brown had no authority to issue verbal order to obtain access to the Limited Partnerships' electronic communications.

Second, under the requirements of 18 U.S.C. § 2516(3), and the Federal Rules of Criminal Procedure, no federal judge would have granted a "general warrant" to stop every third party electronic fund transfer communication going to the Republic for nearly 45 days.

Third, the United States never sought an order within 48 hrs. of acquiring the contents of the Limited Partnerships electronic communication.

Therefore, because the Second Circuit failed to consider the mandate of Congress' as enacted in 18 U.S.C. §§ 2518(7) and 2516(3), its decision that no civil liability exists against the United States and the Drug Enforcement Administration based on the Court's finding that "exigent circumstances" existed (App. 8b), must be reviewed.

II

18 U.S.C. § 2511(1)(a) WAS VIOLATED BY THE UNITED STATES, AND THE DRUG ENFORCEMENT ADMINISTRATION PROCURING THE PROGRAMMING OF "STOP QUES" INTO THE COMMUNICATION MODEMS OF THE INTERMEDIARY BANKS SO TO ACQUIRE THE CONTENTS OF EVERY THIRD PARTY ELECTRONIC COMMUNICATIONS GOING TO THE REPUBLIC OF COLOMBIA BETWEEN JULY 17, 1990 THROUGH AUGUST 26, 1990, INCLUDING THOSE OF ORGANIZACION JD LTDA. AND MANUFACTURAS JD LTDA.

In its decision the Second Circuit failed to discuss the alleged liability of the United State and Drug Enforcement under 18 U.S.C. § 2511(1)(a), for the procuring through the use of "stop ques" programmed in the Intermediary Bank computer modems, to acquire of the contents of the Limited Partnerships' three in transit electronic fund transfer communications (App. 13c).

18 U.S.C. § 2511(1)(a), states in pertinent part that "[e]xcept as other wise specifically provided in this chap-

ter any person who . . . intentionally procures any other person to intercept any electronic communication. . . shall be punished."

18 U.S.C. § 2510(4), in pertinent part defines "intercept" as the "acquisition of the contents of any . . . electronic . . . communication through the use of any electronic . . . device."

18 U.S.C. § 2510(5), in pertinent part defines "electronic . . . device" as "any device or apparatus which can be used to intercept a . . . electronic communication."

Because the Intermediary Banks have admitted to programming "stop ques" into their computer modem to stop every third party electronic fund transfer going to the Republic of Colombia based only on the verbal orders of Messrs. Hui and

Brown, the question involved is whether or not the United States and the Drug Enforcement are liable under 18 U.S.C. § 2520, for this acquiring electronic communications by procuring another to intercept the electronic communications?

Therefore Second Circuit's decision must be reviewed since they considered the wrong issue: i.e. whether the United States was liable for using a "device" to "intercept" electronic communication.

III

BANCO ATLANTICO AND THE BANK OF NEW YORK'S PROGRAMMING OF "STOP QUES" IN THEIR COMMUNICATION MONITORING CONTROLS TO ACQUIRE THE CONTENTS OF ALL IN TRANSIT ELECTRONIC FUND TRANSFER COMMUNICATIONS GOING TO THE REPUBLIC OF COLOMBIA, INCLUDING THOSE OF ORGANIZACION JD LTDA., AND MANUFACTURAS JD LTDA., VIOLATED 18 U.S.C. §§ 2511(1)(c), 2511(2)-(a)(i) AND 2511(3)(a).

The Second Circuit failed to discuss the alleged liability of the In-

termediary Banks under 18 U.S.C. §§ 251-1(1)(c), (2)(a)(i) and (3)(a), for the programming "stop ques" in their computer modems, so to acquire the contents of the Limited Partnerships' three in transit electronic fund transfer communications (App. 11b).

Under these sections the Intermediary Banks are prohibited from disclosing the contents of electronic communication, and from using their communication monitoring system to obtain access to electronic communications.

18 U.S.C. § 2511(1)(c), states in pertinent part that, "any person who . . . intentionally discloses . . . to any other person the contents of any . . . electronic communication, knowing or having reason to know that the information was obtained through the [acquiring

of the contents] of a . . . electronic communication in violation of this subchapter . . . shall be punished." (Emphasis added).

18 U.S.C. § 2511(2)(a)(i), states in pertinent part, that the Intermediary Banks "shall not utilize service observing or random monitoring except for mechanical or service quality control checks."

18 U.S.C. § 2511(3)(a), states in pertinent part that the Intermediary Banks "shall not intentionally divulge the contents of any communication . . . while in transmission on that service to any person or entity other than an addressee or intended recipient of such communication or an agent or such addressee or intended recipient."

Because the Second Circuit's decision failed to consider these sections it must be reviewed.

IV

BANCO ATLANTICO AND THE BANK OF NEW YORK FAILED TO SATISFY THE "GOOD FAITH" REQUIREMENTS OF 18 U.S.C. § 2707, WHEN THEY DIVULGED THE CONTENTS OF ELECTRONIC COMMUNICATIONS OF THE LIMITED PARTNERSHIPS MAINTAINED IN COMPUTER STORAGE WITHOUT ANY AUTHORIZED WARRANT BEING ISSUED.

The Second Circuit remanded to the District Court the claim of the Limited Partnerships for damages against the Government under 18 U.S.C. § 2701 et seq. (App. 15b). However, based on Judge Weinstein's holding in the Consolidated Bank Case, the Second Circuit held that the Intermediary banks could not be held liable under 18 U.S.C. § 2707(a), because of "their good faith reliance on a court [in rem] warrant or order is a

complete defense under § 2701(d)(1)" (App. 12b).

This holding of the Second Circuit that an in rem warrants is sufficient to satisfy the "good faith" requirements of 18 U.S.C. § 2707, must be reviewed by the Supreme Court since it flagrantly disregards the facts and the requirement under 18 U.S.C. § 2703(a), wherein Congress mandated that prior to permitting the United States access to electronic communication stored for less than 180 days a warrant issued under the Federal Rules of Criminal Procedures was needed.

In summary because electronic communication messages stored by the Intermediary Banks in their capacity as electronic communication services for fewer than 180 days are intended to facilitate in transit communication, thus Congress

provided the same level of privacy as it required for in transit communication, House Report No. 647, 99th Congress, 2nd Session, at page 68 (1986); See §19.5, at p. 375, The Law of Electronic Commerce, Benjamin Wright, Little, Brown and Co.

The undisputed facts are that Limited Partnerships' three electronic fund transfers were disclosed to the Messrs. Hui and Brown based only on verbal telephone order on July 24, and 26, 1990, two weeks before the Seventh In Rem Complaint was executed on August 8, 1990; and, in accordance with 18 U.S.C. § 2703(a), the court warrant required to permit government access to electronic communication in computer storage for less than 180 days is a warrant issued under the Federal Rules of Criminal Pro-

cedures, not a self executing warrant issued under Rule C of the Supplemental Rules For Certain Admiralty And Maritime Claims.

18 U.S.C. § 2707, in pertinent part provides for a cause of action against the Intermediary Banks by "any . . . customer aggrieved by any violation of this chapter," unless a court order, warrant subpoena or certification issued under 18 U.S.C. § 2701 et seq. See 18 U.S.C. § 2703(e).

The 18 U.S.C. § 2707(d), states that exception to this liability on the part of the Intermediary Banks, is if they show their actions was based on "good faith reliance on-

(1) a court warrant or order, a grand jury subpoena, a legislative au-

thorization, or a statutory authorization;

(2) a request of an investigative or law enforcement officer under section 2518(7) of this title; or

(3) a good faith determination that section 2511(3) of this title permitted the conduct complained of. . . ."

Based on the above statutory requirements before "good faith" is found, the decision of the Second Circuit is in error and must be reviewed because the Intermediary Banks do not meet any of the requirements under 18 U.S.C. § 2707(d).

V

A CAUSE OF ACTION FOR BREACH OF CONTACT EXISTS AGAINST THE INTERMEDIARY BANKS BECAUSE THEY DISREGARDED THE LIMITED PARTNERSHIPS INSTRUCTIONS CONTAINED IN THE ACCEPTED ELECTRONIC COMMUNICATIONS.

The Limited Partnerships purchased in the Republic of Venezuela three electronic funds transfers to be sent to their office in the Republic of Colombia. Thus they were both the sender and the intended recipient, who paid for the transmission on the FEDWIRE, CHIPS, or SWIFT communication service.

The Intermediary Banks, as part of the FEDWIRE, CHIPS, or SWIFT communication service, agreed to comply with the instructions contained in the electronic communication paid for by the Limited Partnerships.

Despite these obligations the Intermediary Banks, did:

(i) knowingly not comply with the accepted instructions contained in the Limited Partnerships' electronic fund transfers, based only on the verbal orders of Messrs Hui and Brown; and,

(ii) without the required judicial authority under 18 U.S.C. § 2516(3), the Intermediary Banks knowingly disclosed to and permitted access by the United States to the Limited Partnerships' electronic fund transfers.

From these facts a cause of action exist for direct damages against the Intermediary Banks for breach of contract.

Under common law there is an obligation on the receiving Intermediary Banks to not deviate from the instruction contained in the Limited Partnerships Electronic Communication.

In Evra Corp v. Swiss Bank Corp. 673 F.2d 951 (7th Cir. 1982), although the Court of Appeals held that under the holding of Hadley v. Baxendale, 9 Ex. 341, 156 Eng. Rep. (1854), a suit for consequential damages against a banks who fails to make a requested transfer of funds would not be maintained, the Court in dicta did state that a bank would be liable for "direct" (sometimes called "general") damages Id. p. 955.

Furthermore, in Southern Electric Supply Co. v. Raleigh County National Bank, 320 S.E.2d 515 (W.Va. 1984), the court held that the beneficiary of a wire transfer would have a cause of action against a beneficiary bank for deviation from the instructions without the beneficiaries' consent or proper authority. The Court stated,

> [w]e would be hardpressed to think of a situation in which we could condone a bank's decision to ignore the instructions of a [sender] and unilaterally decide to alter [an electronic fund transfer]. To get a third party's funds, a bank would need explicit authority from the third party.... Whether the unauthorized person is a stranger, family, or bank officer, the withdrawal is wrongful. When a wire transfer comes to a bank, it is obligated by the transmission to credit the designated account. Id. 320 S.E.2d at 519.

This right of action for direct damages relating to the Intermediary Banks deviation from the instructions in the Limited Partnerships' electronic communication without proper authority issued under 18 U.S.C. § 2516(3), is consistent with Regulation J of the Federal Reserve System, 12 C.F.R. §210, (January 1, 1990 Edition), issued by the Board of Governors of the Federal Reserve System pursuant to the Federal Re-

serve Act, 12 U.S.C. § 342(13), 464(19)(f), and 248(i) (j) and (o).

The regulations place a duty on the Intermediary Bank to follow the instructions contained in the wire transfer.

12 C.F.R. §210.26 Definitions, states:

> "Transferee" means a member bank, or other institution that (1) maintains or, if authorized by the Reserve Bank, uses an account at a Reserve Bank and (2) is designated in a transfer item or request to receive the amount of the item or request.

12 C.F.R. §210.30(b) Transferee's agreement, states:

> A transferee...that receives a transfer item, or advice of credit of a transfer item, designating a beneficiary agrees:
> (1) To credit promptly the beneficiary's account or otherwise make the amount available to the beneficiary: or
> (2) To notify promptly its reserve Bank if it is unable to do so because of circumstances beyond its control. (Emphasis added)

The above court decisions and regulations are also consistent with the technological reality dealt with by the Commissioners on Uniform State Laws and the American Law Institute completed in October, 1989, U.C.C. Article 4A, which is aimed at providing a comprehensive body of law governing electronic fund transfer communications. See D. Baker & R. Brandel, The Law of Electronic Fund Transfer Systems, ¶1.01(2d ed. 1988).

On January 12, 1991, the State of New York enacted the State of New York Uniform Commercial Code-U.C.C. §4-A.

Under U.C.C. Section 4A-302, the receiving bank, whether it be the "intermediary bank" or the "beneficiary bank" is obligated to both the sender and the intended beneficiary to follow all instructions of the sender.

Under U.C.C. §4A-405, which underscores the rule that an Article 4A electronic fund transfer is not really a direct transfer of funds from buyer to seller, but instead is a series of transactions. With the completion of each payment order, a bank becomes obligated to pay funds to the next link in the chain, culminating with the duty of the beneficiary's bank to pay the beneficiary. In other words it is a series of contractual obligations to pay rather than a direct exchange of funds from buyer to seller.

Thus when the electronic funds transfers were received by the Intermediary Banks they were obligated under a contract with the electronic funds transfers communication service network to not deviate from the instructions,

and to immediately transmit the electronic funds transfers communication to the Limited Partnerships.

Since no authorized judicial warrant was ever issued under 18 U.S.C. § 2516(3), a cause of action for breach of contract exists, and the Second Circuits holding that the "intervening government actions in ordering the [acquiring of the contents of the three electronic communication] rendered any enforceable contract impossible to perform," must be reviewed (App. 19b).

CONCLUSION

The Petition for Writ of Certiorari should be granted because it involves important national and international questions affecting commercial information technology, as well as the rights and duties for the transmission and com-

puter storage of electronic communication under both recently enacted federal communication law, and under contract theory.

The facts establish that their were intentional:

(1) violations of 18 U.S.C. §§ 251-1(1)(a) and (c); 2511(2)(a)(i); § 2511-(3)(a), based on the procuring of the programming of "stop ques" so to obtain the acquisition of the contents of all in transit electronic funds transfer communications to the Republic of Colombia for over 45 days;

(2) violations of 18 U.S.C. § 2702-(a), by the Intermediary Banks unauthorized divulging of the Limited Partnerships electronic communication in electronic storage; and,

(3) violations of the FEDWIRE, CHIPS, and SWIFT communication system contract with the Limited Partnerships, by the Intermediary Banks.

Thus to leave the Second Circuit decision unreviewed will disregard the recent changes made by Congress in electronic communications law, aimed at positively affect business in the future on the "Electronic Super Highway."

Based on the above the Petition for writ of certiorari should be granted.

Respectfully submitted,

ORGANIZACION JD LTDA., AND
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